

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

V. VAN DYKE, INC.

Employer

and

Case 19-RC-14363

GENERAL TEAMSTERS LOCAL 174,  
affiliated with the INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
AFL-CIO<sup>1</sup>

Petitioner

**REGIONAL DIRECTOR'S DECISION AND  
DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned makes the following findings and conclusions.<sup>3</sup>

**SUMMARY**

On March 11, 2003, the Petitioner filed the instant petition seeking a unit of 21 full-time and regular part-time truck and steer car drivers employed by the Employer at its Seattle, Washington facility. The Employer contends that the unit sought by the Petitioner is inappropriate because it seeks to include the steer car drivers and because it excludes mechanics and a clerical.

Based on the record as a whole, I conclude that the unit sought by the Petitioner is an appropriate unit. Accordingly, I shall direct an election in a unit of all full-time and regular part-time drivers and steer car drivers, and shall exclude all other employees employed by the Employer.

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<sup>1</sup> The name of the Union appears as amended in the hearing.

<sup>2</sup> Both parties filed timely briefs, which were duly considered.

<sup>3</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Below, I have set forth a section dealing with the facts, as revealed by the record in this matter, and relating to background information about the Employer's operations and the terms and conditions of employment for the drivers, steer car drivers, mechanics and the clerical. Following the Fact section is a restatement of the Parties' position, my analysis of the applicable legal standards in this case and a section setting forth the direction of election.

## **A.) FACTS**

### **1.) Background**

The Employer is a State of Washington corporation engaged in the heavy haul trucking business. The Employer has a terminal facility located in Seattle, Washington consisting of an office, a mechanic's shop, a couple of outbuildings, a storage area, and a parking area for its trucks and trailers, herein collectively referred to as the Employer's Facility. The Employer began operations on November 15, 2002, when it purchased another company's assets under the same name.

The Employer's business consists of transporting pre-cast concrete and both concrete and steel structural girders to customers at construction sites throughout the continental United States. The products transported are used in building and bridge construction and for underground utilities such as water, sewer and electric. The Employer has transported, for example, bridge girders weighing in excess of 200,000 pounds and up to 185 feet in length. In transporting this material, the Employer uses a variety of trailers including 40 to 48 foot flat beds, pull trailers, log trailers, heavy duty dollies (both manually and remotely steered), stretch trailers, step trailers, tank trailers and lo boys. The Employer's operations runs 24 hours a day, 7 days a week.

The President, Cliff Bates, oversees the Employer's operations. He is responsible for hiring, discharging and disciplining employees and is solely responsible for the Employer's budget, including setting freight rates, negotiating with and paying vendors, arranging outside financing and approving disbursement of all funds.<sup>4</sup>

In the Employer's operations, it currently employs fifteen truck drivers, six steer car drivers, two mechanics, one dispatcher, one clerical employee, one sales person and apparently some pilot drivers. Testimony indicates that the Employer employs pilot drivers on an on-call basis but no specific number or the regularity of their employment was proffered.<sup>5</sup>

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<sup>4</sup> Neither party seeks to include the President in the unit but there was no express statement by the parties in this regard. The record indicates that the President is the sole statutory supervisor at the Employer's facility. All employees report to the President. In light of the above and the record as a whole, I find the President to be both a statutory supervisor and a managerial employee and shall exclude that position from the unit.

<sup>5</sup> Both parties agree that the dispatcher should be excluded from any unit found appropriate. Although Petitioner, in its brief, contends the parties stipulated to the exclusion of pilot drivers and the salesperson, the record fails to contain such a stipulation. However, the record reveals that the Employer subcontracts out some pilot driver work but the extent and nature of this subcontracting is not apparent. In any event, it does not appear that either party contends that pilot drivers or the sales person should be included. In view of the above and the record as a whole, I shall exclude the dispatcher, salesperson and pilot drivers from the unit.

At the Facility, the Employer maintains a mechanic's shop, where the two mechanics are located. Also located at the Facility is a building where the President maintains his office and the clerical employee shares an office with the salesperson. There is also an office where the dispatcher dispatches drivers and relays, from drivers, repair requests to the mechanics. The sales person, besides performing traditional inside and outside sales duties, also serves as a relief dispatcher.

The Employer garners its business for its transportation service by the President quoting freight rates to customers. Once business has been secured, the President budgets resources to carry out the job. The dispatcher, with occasional assistance from the truck drivers, maps out the route the drivers will take to deliver material to construction sites. The route chosen must take into consideration, for example, city or state ordinances restricting the weight and size of vehicles allowed on public roads and throughways. If a truck driver needs assistance in transporting material, the dispatcher will also dispatch, in addition to the truck driver, a steer car driver and possibly a pilot driver or contract out the pilot driver function.

## **2.) Truck Drivers**

The Employer employs fifteen truck (or trailer) drivers who drive the variety of trucks and trailers supplied by the Employer. Three of the truck drivers are long haul or over-the-road drivers who drive material to overnight destinations. Roughly one-third of the truck drivers are local drivers and another third are both long haul and local drivers. Each truck driver has an assigned truck. The truck drivers are required to have a commercial driver's license (CDL) and the Employer must submit to its insurance company the social security number, date of birth, and DMV record for each of its truck drivers.

Truck drivers must call in every day to receive an assignment and check to see if there is an assigned run for the next day. They also must report personally to the office each day unless they are already on a scheduled run.

When a truck driver receives a dispatch, he sometimes goes over the route with the dispatcher if the route is not routine. He will also check out his truck for mechanical problems in accordance with a pre-trip checklist supplied by the Employer. If he finds a problem with the truck, he will fill out a "cry sheet" describing the problem and turn it into the dispatcher, who, in turn, will generally send the cry sheet on to one of the mechanics. The truck driver is also responsible for securely loading the material to be transported onto the truck. He is also responsible for inspecting the material for damage before he leaves, for inspecting, again, at the delivery point and recording any damage in his paperwork. Truck drivers are responsible for pick-up and delivery paperwork, bills of lading, filling out logbooks and recording their mileage.

Truck drivers are paid hourly unless they are on an overnight trip. Their hourly pay ranges from \$17 to \$18 an hour. When truck drivers are on an overnight route, they are paid \$0.30 to \$0.31 per mile and receive per diem for motels, rather than receiving a wage rate. They also receive a year-end bonus that ranges from \$250 to \$1,500. Truck

drivers receive such benefits as healthcare, including vision and dental, vacation days, and holiday pay.<sup>6</sup>

### **3.) Steer Car Drivers**

About 20 to 30 percent of the Employer's hauling business involves steer car drivers. When a load is large, a different truck configuration is sometimes necessary. That configuration can take the form of a trailer with an attached "jeep" and/or a steer car at the back end of the truck and/or trailer. These attached vehicles are used to help balance out the weight of the material being transported as well as to assist in turning street corners when the load is large and/or wide. In such situations, the Employer assigns a steer car driver to work with the truck driver on the haul. A truck driver testified at the hearing in this matter that the rear car driver does have an independent set of brakes, although this was disputed by the President. However, the steer car driver does not have an accelerator.

When the dispatcher dispatches a steer car driver, the steer car driver assists the truck driver with the pre-trip check of the truck and inspection of the material to be delivered. In that regard, he assists in checking the electrical and air-line hook-ups, checking for air and tire leaks, and checking to see the doors are closed on the steer car. The steer car driver also checks whether there are any loose lug nuts and any cracks. The steer car drivers also assist truck drivers in loading and securing material. Steer car drivers also keep their own logs.

While en route with a load, the steer car driver steers the steer car around corners or, at times, when the truck driver needs to change lanes. Steer car drivers also direct truck drivers when trucks need to back up and when units are parked.

The steer car drivers and truck drivers communicate by radio so that they can coordinate a turn, determine where the restaurants and motels are, and for directions. The radio is also used to communicate with any pilot driver who may be directing traffic around the truck. Pilot trucks precede and/or follow the truck and can also be used for helping navigate the truck through a city. The Employer sometimes contracts out for pilot drivers in cities where a driver local to that city knows the best routes through the city.

When a load has been delivered or the truck and steer car drivers are en route to pick up a load, the steer car driver rides with the truck driver. When there is no load, the steer car is moved closer to the truck and, thus, it does not require that the steer car driver drive the steer car. Steer car drivers who drive in Oregon are required by Oregon law to possess a CDL and some of the Employer's steer car drivers possess CDLs.

Steer car drivers are part-time, on-call employees called in by the dispatcher. They do not need to report in every day or accept a job when called. They also have no regular schedule. The President does not know how long the steer car drivers have been employed by the Employer and its predecessor but he testified that four of the steer car drivers are "long term" employees employed for at least ten years.

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<sup>6</sup> It is not clear whether the holiday pay is a premium for working holidays or whether the drivers receive the holiday off with pay.

During 2002, the Employer employed six steer car drivers. Their total hours for that year ranged from 121.25 hours to 1,371 hours. Four of the six drivers each worked in excess of 800 hours in 2002. Steer car drivers do not receive mileage pay; rather they earn \$10 to \$12 an hour, with all but one earning \$12 an hour. One steer car driver, Russell Fredricks, received a bonus of \$1000.00 for the year 2002.<sup>7</sup> Another steer car driver, Steve Wegener, receives health insurance but no 401(k). Other than what is noted above, no other steer car driver receives the benefits that are received by the truck drivers.<sup>8</sup>

It appears that one of the current truck drivers was a steer car driver prior to 1996. It also appears that until recently, when business has slowed down, steer car drivers had driven trucks back to the terminal after loads had been delivered. This had occurred about twice monthly. In the last six months, truck drivers had driven steer cars about six or seven times. Truck drivers double as steer car drivers when business is slow.

#### **4.) Mechanics**

The Employer employs two full-time mechanics: Carl Buss, the lead mechanic, and Parnell Peffley.<sup>9</sup> The mechanics repair the Employer's vehicles and configure and put together units used for the oversized, overweight loads. Both mechanics are journeymen mechanics. The mechanics generally work during the day, Monday through Friday, but occasionally will work a night shift. However, work outside their normal schedule is infrequent.

Mechanics receive repair orders from the dispatcher. Sometimes, when a truck driver is on the road and a repair is needed, a mechanic may be dispatched to the truck; however, this also happens infrequently. When it does occur, it appears that a truck driver may assist in handing tools to the mechanic or holding a tool in a certain way for the mechanic, but truck drivers do not perform the mechanic's job and only provide limited and infrequent assistance. If a truck breaks down on an overnight trip, it appears that a mechanic may speak to the truck driver by phone to determine what the problem is and possibly talk the driver through a minor repair. But, more often, the truck driver will have the truck serviced by a mechanic local to the area where the truck broke down. The mechanics may also converse with truck drivers if a truck is in the shop or a unit is being configured and put together.

The lead mechanic, Buss, was once sent on a special project just outside Seattle in Issaquah, Washington for two and one-half months last fall. The Issaquah site used special equipment and Buss was there to insure the equipment operated properly and he assisted in loading the special unit. While on this project, Buss did not drive a truck or a steer car. Indeed, Buss does not have a CDL license and there is no evidence he was ever assigned to drive a truck or steer car.

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<sup>7</sup> The President corrected Employer's Exhibit 5 where that exhibit stated Steve Wegener received the \$1000.00 bonus.

<sup>8</sup> The President did not know why Wegener and not the other steer car drivers received health benefits.

<sup>9</sup> In its brief, the Petitioner contends that Buss is a supervisor. However, the record does not disclose sufficient evidence to establish such status. Consequently, my decision to exclude Buss, as a mechanic, does not rest on his alleged supervisory status.

Buss is salaried and makes \$54,730 a year. He is not eligible for overtime pay. He received a \$23,000 bonus for 2002, part of which was for his work on the special assignment to Issaquah. He receives the same benefits that the truck drivers receive.

Peffley, the Employer's other mechanic, performs the same work as Buss. However, he works hourly at a rate of \$19.50 an hour and is eligible for overtime pay. He received a bonus in 2002, but the president was unsure of the amount. However, it appears the bonus was less than \$500. He receives the same benefits that the lead mechanic and the truck drivers receive.

Peffley possesses a CDL license. Since the President purchased the company, in November, Peffley has driven a steer car possibly twice, but the record is unclear on this point and silent as to whether he was paid his normal hourly rate while driving steer cars. There is no evidence that he ever drove any of the trucks or trailers.

#### **5.) Clerical**

Gloria McEvoy is the Employer's clerk. While it is not entirely clear, McEvoy apparently prepares invoices/repair orders, deals with human resource and payroll issues, reports payroll, performs accounts payable work and takes incoming calls. She has limited contact with the truck and steer drivers. Testimony indicates that a truck driver may speak with her once in two and one-half months on a health insurance, 401K or payroll question.

McEvoy is an hourly employee eligible for overtime, but it appears she has never worked overtime. She was paid \$40,000 in 2002 and received a \$9,000 bonus for that year. She works only during the day and does not possess a CDL license. She receives the same benefits as the mechanics and the truck drivers.

#### **B.) POSITION OF THE PARTIES**

Petitioner seeks a unit of the Employer's truck and steer car drivers, excluding all other employees. Contrary to the Petitioner, the Employer contends that the unit sought by the Petitioner is inappropriate because it includes the steer car drivers and excludes the mechanics and clerical. In particular, the Employer essentially contends that the steer car drivers do not share a sufficient community of interest with the truck drivers while the mechanics and clerical do share such a sufficient community of interest with the truck drivers as to require their inclusion.

Alternatively, the Employer maintains, in essence, that if the steer car drivers were included in the unit, the mechanics and the clerical employee would constitute a residual unit and, thus, should properly be included in the unit of truck and steer car drivers.

#### **C.) ANALYSIS**

In the *Boeing Co.*, 337 NLRB No. 24 (2001), the Board described its policy with respect to determining appropriate units:

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g., *Overnite Transportation Co.*, 331 NLRB No. 85, slip op. at 2 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

Nothing in the National Labor Relations Act requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Bartlett Collins Co.*, 334 NLRB No. 76 (2001); *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Federal Electric Corp.*, 157 NLRB 1130 (1966); *Parsons Investment Co.*, 152 NLRB 192 fn. 1 (1965); *Capital Bakers*, 168 NLRB 904, 905 (1968); *National Cash Register Co.*, 166 NLRB 173 (1967); *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986); *Dezcon, Inc.*, 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that request does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, "the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co.*, *supra*.

Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, for example, *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–423 (4th Cir. 1963), *cert. denied* 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). The Board will pass only on the appropriateness of units that have been argued for. *Acme Markets, Inc.*, 328 NLRB 1208 (1999).

A petitioner's desire as to unit is always a relevant consideration but cannot be dispositive. *Marks Oxygen Co.*, *supra*; *Airco, Inc.*, 273 NLRB 348 (1984). Obviously, a proposed bargaining unit based on an arbitrary, heterogeneous, or artificial grouping of employees is inappropriate. *Moore Business Forms, Inc.*, 204 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Thus, when all maintenance and technical employees have similar working conditions, are under common supervision, and interchange jobs frequently, a unit including only part of them is inappropriate. *United States Steel Corp.*, 192 NLRB 58 (1971).

The discretion that is granted to the Board in Section 9(b) to determine the appropriate bargaining unit is reasonably broad, although it does require that there be record evidence on which a finding of appropriateness can be granted. *Allen Health Care Services*, 332 NLRB No. 134 (2000). The only statutory limitations are those pertaining to professional employees (Sec. 9(b)(1)); craft representation (Sec. 9(b)(2)); plant guards (Sec. 9(b)(3)); and extent of organization (Sec. 9(c)(5)).

As noted above, I find that the unit sought by the Petitioner is an appropriate unit. In making a determination on the appropriateness of the petitioned-for unit, the Board weighs various community of interest factors, including:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs...the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

*Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). The Board has acknowledged that truck drivers often have a “dual community of interest,” with certain factors supporting their inclusion in the same unit as other plant employees, and certain factors favoring their representation in a separate unit. See *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971).

In view of the above legal standards, the initial issue in this case involves whether the steer car drivers share a sufficient community of interest with the truck drivers. The record evidence establishes that such a sufficient community of interest exists. In particular, the record reveals that Employer’s hauling services operate 24 hours a day, 7 days a week and that both the truck and steer car drivers’ work hours and days are scheduled within the Employer’s 24/7 operations. Both receive hourly wages and apparently receive per diem when overnight travel is involved except truck drivers receive a mileage rate rather than an hourly rate when overnight travel is involved, in addition to per diem. Both drivers share common supervision and both spend the significant portion of their work-time on the road and away from the Employer’s Facility hauling product to the Employer’s customers. Steer car drivers never work alone; rather they are always assigned to work with another truck driver on a haul.

While the record does reveal some differences in the truck and steer car drivers’ terms and conditions of employment, I find that those differences do not negate the sufficient community of interests shared by both driver classifications with regard to work situs, wages, skills and functions, contact, and common supervision. Truck drivers and helpers have long been regarded by the Board as having interests sufficiently diverse from other employees to warrant the establishment of a separate unit for them. See, e.g., *Walker Co.*, 183 NLRB 1322, 1323 fn.8 (1970); *J.L. Brandeis & Sons, Inc.*, 142 NLRB 825 (1963); *Oklahoma Scrap Paper Co.*, 75 NLRB 854 (1948). Here, steer car drivers not only serve as truck driver helpers, they also perform a driving function and occasionally drove the trucks that the truck drivers drive. They also keep logs like truck drivers and some of the steer car drivers have CDLs, which are also necessary for steer car driving in Oregon. Thus, I find that the steer car drivers share a sufficient community of interest with truck drivers to warrant their inclusion.<sup>10</sup>

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<sup>10</sup> The Employer relies on *Ore-Ida Foods, Inc.*, 313 NLRB 1016 (1994) and *Indiana Refrigerator Lines, Inc.*, 157 NLRB 539 (1966) that separate units of truck and steer drivers is appropriate. It may well be that separate units of the Employer’s truck and steer drivers are appropriate. However, unlike the petitioners in *Ore Ida Foods* and *Indiana Refrigerator Lines*, Petitioner has petitioned for a single unit of truck and steer drivers, which is also appropriate.



With respect to the issue of the exclusion of the mechanics and the clerical, the record does not reveal that they share such a sufficient community of interest with the drivers as to require their inclusion. In particular, the record evidence establishes that the mechanics and clerical work schedule is based on working days, Monday through Friday, which is substantially dissimilar to the 24/7 nature of the drivers' work schedules. Both the mechanics and clerical work primarily and/or exclusively at the Facility while the drivers' work-time is normally spent on the road and away from the Facility. The mechanics have infrequent contact with the drivers. Indeed, drivers' concerns over mechanical problems are generally routed through the dispatcher rather than directly to the mechanics. The nature of work performed by the drivers, mechanics and clerical are distinctly different and involve significantly different skills and experience. One of the mechanics receives a salary rather than an hourly wage rate and neither the mechanics nor the clerical are required to carry a commercial drivers license.

Although the truck drivers share common supervision, benefits, and share some degree of interaction and limited integration with other employees, the Board, in similar circumstances, found these similarities are substantially outweighed by the factors supporting a conclusion that the drivers as a group share a distinct community of interest, and therefore constitute an appropriate unit. *Home Depot USA*, 331 NLRB 1289 (2000).

Concerning contacts and interchange between truck drivers and mechanics, there is some testimony that a mechanic during a special assignment accompanied a driver to a construction site, and that another mechanic "possibly" drove a steer car twice since the Employer began operations. However, there is no evidence that any employee other than a driver ever operates the large delivery trucks. See *Home Depot USA*, 331 NLRB at 1289. Further, it is the frequency and substance of such instances of contact and interchange that must also be considered. See *Home Depot USA*, 331 NLRB 1289, 1291 fn.11 (2000); *Leslie Metal Arts Co. Inc.*, 167 NLRB 693, 694 fn.6 (1967). There is no evidence here that accompanying a driver on an isolated delivery or possibly driving a steer car constitutes contact or interchange that is regular in any sense of the word. Indeed, the evidence indicates that such contact and interchange is infrequent while it appears clear that there is regular and relatively extensive contact between the truck and steer car drivers when they are working on the same haul.<sup>11</sup>

The record reveals other infrequent contact between truck drivers and mechanics involving a truck driver explaining mechanical problems to a mechanic or handing tools to the mechanic working on the driver's truck. Such contact occurs in the mechanics shop, but also infrequently occurs on the road. However, the record reveals that drivers typically don't have contact with the mechanics; rather, the dispatcher relays the truck drivers' mechanical concerns to the mechanics. In any case, the Board found such contact and integration among mechanics and drivers are insufficient to require the inclusion of mechanics in a truck driver unit. *Overnite Transportation Co.*, 325 NLRB 612 (1998).

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<sup>11</sup> The record is silent as to the reasons that a mechanic "possibly" drove a steer car. In any event, testimony indicates that the mechanic "possibly" drove a steer car during a slow business period. The evidence indicates that truck drivers drive steer cars during slow business periods. If the mechanic also drove a steer car for this reason, I find such evidence is insufficient to find substantial interchange among drivers and other employees. See *Home Depot USA*, 331 NLRB at 1291.

As for whether the clerical position's inclusion is required, as the Employer contends, the record indicates that her duties include preparing invoices/repair orders, dealing with human resource and payroll issues, reporting payroll, performing accounts payable work and taking incoming calls. She works in an office shared with the sales employee, who doubles as a relief dispatcher. Thus, I find her duties are mostly those of an office clerical in nature and that, alone, in these circumstances, would be a sufficient basis for excluding her from the unit. See *Big "N" Department Store No. 307*, 200 NLRB 935, 936 (1972).

The Employer further asserts that the clerical and the mechanics would constitute a residual unit if I included the steer car drivers in the unit; thus, the clerical and the mechanics should also be included in the unit if the steer drivers are included.<sup>12</sup> The Employer has submitted no case law supporting its assertion in this regard and the record certainly does not support such in light of the fact that, in addition to the clerical and mechanics, other excluded positions include the pilot drivers, the dispatcher and salesperson. See *Big "N" Department Store No.*, supra (office clerical, sales and service employees unit appropriate); *Interstate Motor Freight System*, 227 NLRB 1167 (1977)(dispatcher and office clerical unit appropriate). Thus, this grouping of employees is not residual to the petitioned-for unit. See *Overnite Transportation Co.*, 322 NLRB 725 (1996).

With respect to the on-call nature of the steer car drivers work, the Employer contends that the steer car drivers have no expectation of future employment and, unlike truck drivers, are able to reject the Employer's calls for work. Consequently, the Employer contends the steer car drivers should be excluded from the unit. As noted above, the classification of steer car driver is appropriately included in the unit as the record discloses that regularly working employees in that position share a sufficient community of interests with the truck drivers. Whether a particular steer car driver works on a "regular" basis is another matter and goes to the issue of their individual eligibility.

On-call employees—those with no regular schedule of work—are generally considered eligible to vote if they regularly average 4 or more hours of work per week for the last quarter prior to the eligibility date. See *Davison-Paxon Co.*, 185 NLRB 21 (1970); and *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994). See also *Trump Taj Mahal Casino*, 306 NLRB 86 (1992). "On-call" employees may or may not be considered regular part-time employees, depending on the specific nature of their employment. Where they are employed sporadically, with no established pattern of

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<sup>12</sup> The Employer cites *North Jersey Newspapers Co.*, 322 NLRB 394 (1996) for the proposition that the Board attempts to prevent a residual unit where there will be a few employees left unrepresented. However, the only issue presented to the Board in *North Jersey Newspapers* was the statutory supervisory status of foremen. In any event, the Regional Director in that case referred to the Board's policy of not leaving a single individual at a facility without the possibility of representation, since the Board does not recognize a single employee unit. That is not the case here. In fashioning overall or larger units, the Board is reluctant to leave a residual unit where the employees could be included in the larger group. See *Huckleberry Youth Programs*, 326 NLRB 1272 (1998). However, even in that case, the Board, in agreement with the petitioner and contrary to the Regional Director in that case, included the petitioned-for "residual" employees into the larger presumptively appropriate unit petitioned-for by the petitioner. Here, the employees the Employer seeks to include are not "residual" to the petitioned-for unit nor are they employees the Petitioner seeks.

regular continuing employment, they are excluded from the unit. *Piggly Wiggly El Dorado Co.*, 154 NLRB 445, 451 (1965); *G. C. Murphy Co.*, 128 NLRB 908 (1960). But where “on-call” employees have a substantial working history, with a substantial probability of employment and regular hiring, and meet any other criteria established by the Board, they are considered regular part-time employees. *Davison-Paxon Co.*, supra; *Berlitz School of Languages*, 231 NLRB 766 (1977); *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975); *Columbus Plaza Motor Hotel*, supra; *Bailey Department Stores Co.*, 120 NLRB 1239 (1958). See also *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994).

In a case involving drivers, the Board confronted issues similar to the issues present here. In that Board case where the number and identity of drivers and other employees fluctuated from week to week but a substantial number reported and worked fairly regularly over a period of several months, and during an 8-month period 70 of approximately 120 to 125 drivers worked in three or more consecutive weekly pay periods, with many more working in 10 or more consecutive weeks, the Board concluded that this “is scarcely the pattern of a temporary, part-time or casual work force.” *Fresno Auto Auction*, 167 NLRB 878 (1967). In that case, the Board made the further comment that “In determining the relative regularity or permanence of the employment in the proposed unit, we believe this fact outweighs those considerations having to do with the individual’s freedom to determine his own work schedule or to report for work intermittently.” The fact that they were carried on the payroll, as part-time workers, did not “alter the character of the work force as a cohesive group of individuals with a strong mutual interest in their working conditions.” *Id.* See also *Henry Lee Co.*, 194 NLRB 1107 (1972).

In the instant case, it is undisputed that four of the steer car drivers, whose identity is clear in the record, worked in excess of 800 hours in 2002. It is also undisputed that four of the six have worked in the operations, recently acquired by the Employer, for 10 years or more but the record does not identify these four individuals. Also, it is not clear what actual work the steer car drivers performed during the first calendar quarter of 2003. The record also reveals that the steer car drivers worked a wide range of hours in 2002 and that there is a cyclical aspect to the Employer’s operations, which is tied to activity in the construction industry, which, in turn, can be adversely impacted by weather particularly in the winter months.

Where there is a wide disparity in the numbers of hours worked by part-time employees, the Board may fashion an appropriate standard to assure an equitable voter eligibility formula. Compare *Marquette General Hospital*, 218 NLRB 713 (1975), with *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990), and *Northern California Nurses Assn.*, 299 NLRB 980 (1990). See also *Beverly Manor Nursing Home*, 310 NLRB 538 (1993). In light of the above and the record as a whole, I find that the usual eligibility formula set forth in the Board’s *Davison-Paxon Co.*, 185 NLRB 21 (1970) decision would probably and unfairly exclude steer car drivers, who have either worked in excess of 800 hours during 2002 and/or who have been employed for 10 years or more. The unfairness would come with failing or refusing to account for the winter months of January through March 2003. With this in mind, I find that those steer car drivers, who had worked in excess of 800 hours during 2002 or who have worked for 10 years or more in the Employer and its predecessor’s operations and who have not quit or been terminated since reaching the 800 hour or 10-year requirements, are eligible to vote in the election. I shall permit the remaining steer car drivers to vote subject to challenge.

On the basis of the foregoing and the record as a whole, I shall direct an election be held in the following appropriate unit:

All full-time and regular part-time truck drivers and steer car drivers employed by the Employer at its Seattle, Washington facility, excluding office clericals, mechanics, sales employees, dispatchers, pilot drivers, managers, guards and supervisors as defined by the Act.

There are approximately 21 employees in the unit.

**D.) DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by General Teamsters Local 174, affiliated with the International Brotherhood of Teamsters, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

**1. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are steer car drivers who had worked 800 hours or more during 2002 or who have been employed over the past 10 years in the Employer and its predecessor's operations and who have not quit or been terminated since reaching the 800 hour or 10-year requirements. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**2. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office in Seattle, Washing, an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before April 23, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (206) 220-6305. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **3. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **4. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by 5 p.m., EST on April 30, 2003. The request may **not** be filed by facsimile.

**DATED** at Seattle, Washington this 16<sup>th</sup> day of April 2003.

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Catherine M. Roth, Acting Regional Director  
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Seattle, WA 98174

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